IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2614/21

In the matter between:

SOUTH AFRICAN WEATHER SERVICE	**Applicant**
and	
LUCKY NTSANGWANE	**First Respondent**
COMMISSIONER RICHARD BYRNE	**Second Respondent**
COMMISSION FOR CONCILIATION AND ARBITRATION	**Third Respondent**

Heard: **13 August 2024**
Delivered: **15 August 2024**

JUDGMENT

LENNOX, AJ

[1] This is an application brought to review and set aside an arbitration award. Complicating the matter is the fact that the record was served outside the prescribed 60 day period. As such the Applicant must first obtain the consent of the Court to reinstate the review application which is deemed to be withdrawn.

[2] Briefly stated the First Respondent was a permanent employee of the Applicant since at or about 2004, holding various positions at various times. In or about 2008 he was appointed as the Manager: Research. Having acted as

the Senior Manager: Research on occasion he applied for the position when same was advertised in 2017. Despite not having the required PHD degree he was successful in his application and appointed to a 5 year contract with effect from 1 October 2017.

[3] Another applicant for the position was aggrieved by the appointment of the First Respondent and sought the intervention of the office of the Public Protector which found the appointment to be improper and required the Applicant to apply to review and set aside the appointment. Before this was done the unsuccessful applicant launched proceedings in the High Court which culminated in the following Order being granted on 12 October 2020, the relevant portions of which read:

> '2 That the First Respondent's decision to appoint the Second Respondent to the position of Senior Manager: Research, advertised by the First Respondent under reference number WS03/06217, is reviewed and set aside;
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> 3. That the fixed term employment contract concluded between the First Respondent on the one hand and the Second Respondent on the other hand on 29 September 2017 in terms of which the Second Respondent was appointed as the Senior Manager: Research is reviewed and set aside…'

[4] The Applicant did not oppose the application and neither did the First Respondent, despite initially having filed a notice of opposition. Nothing turns on this.

[5] Following this, and on 19 October 2020, the Applicant addressed correspondence to the First Respondent advising him that his employment contract in the position of Senior Manager: Research which was terminated with immediate effect. That ended the employment of the First Respondent with the Applicant. Dissatisfied the First Respondent referred an unfair dismissal dispute to the Third Respondent. The Applicant called no witnesses

and disputed that it has dismissed the First Respondent arguing that it was the Order of the High Court which terminated the employment of the First Respondent.

[6] The Second Respondent found that there had been a dismissal and that same was unfair and ordered that the Applicant reinstate the First Respondent into its employ on terms and conditions that were applicable to the Applicant whilst in the position of Manager: Research and further ordering the payment of twelve months compensation.

[7] The Applicant brought an application to review and set aside this award in time but failed to file the record in terms of Rule 7A(6) of the Labour Court Rules[1] within the required 60 day period. The application is accordingly deemed to be withdrawn in terms of the Practice Manual[2] applicable at the time. The Applicant has sought to revive the application.

[8] In the Heads filed by the Applicant in support of the application for reinstatement, the general thrust of the submissions is that an application for reinstatement is akin to an application for condonation. The judgment of the Labour Appeal Court in *Samuels v Old Mutual Bank*[3] was cited as authority. Paragraph 17 of the judgment reads:

> 'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be *bona fide*; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant

[1] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.
[2] Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.
[3] (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC) at para 17.

must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

[9] In the recent decision of *Govender and others v Commission for Conciliation, Mediation and Arbitration and others*[4] the following was stated in paragraphs 57 and 58:

'A reinstatement application is, in essence, a condonation application and accordingly, the principles applicable to condonation apply. The factors relevant in the consideration of the grant or refusal of condonation include the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. And in certain cases, the interest of justice may play a role.

Added to the factors applicable to condonation applications is the consideration that employment disputes should be dealt with expeditiously as a delay in the resolution of labour disputes undermines the object of the LRA and *"any determination of the issue of good cause must always be considered against the backdrop of this fundamental principle"* and further that review applications are by their nature, urgent and must be treated with a degree of diligence and promptness.' (footnotes omitted)

[10] *Govender* continues at paragraph 64 as follows:

"Where a party fails to make use of clause 11.2.3's saving provision either by (i) not seeking the respondent's consent at all; (ii) in seeking the respondent's consent and in the event such consent is refused, the applicant then fails to approach the Judge President on application for an extension; or (iii) seeks

[4] [2024] 5 BLLR 453 (LAC); [2024] ZALAC 6 (LAC) at paras 57 to 58.

the respondent's consent but only after the 60-day period has expired, then a court would be correct in taking this factor into consideration when determining the reinstatement of the review application as it speaks to the steps taken by the applicant in duly prosecuting their dispute. It does not matter whether the respondent, as it here claims, would have given its consent had the request been made timeously, this is simply an irrelevant consideration and rather gratuitous in light of the vigour with which condonation was opposed."

[11] The application for reinstatement is based on the following facts:

1. On 24 December 2021 the record was made available for collection;

2. The offices of the Applicant's attorneys were unsurprisingly closed at the time and the record was collected once they re-opened on 13 January 2022;

3. On 14 January 2022 an instruction as given to Mzanzisa Business Solutions Transcribers to transcribe the record;

4. A query was made by the Applicant's attorneys to the transcribers on 22 February 2022 as to what progress was being made;

5. The time period for filing the record expired on 7 April 2022;

6. The First Respondent's attorneys enquired on 25 April 2022 as to when the record would be filed to which a response was sent on 26 April 2022;

7. On 18 May 2022 the Third Respondent launched an application to dismiss the review application in terms of Rule 11;

8. On 23 May 2022 the Applicant's attorney requested that the Rule 11 application be abandoned;

9. On 24 May 2022 the transcribers provided the record;

10. On 25 May 2022 the record was filed some 29 days out of time.

[12] Clause 11.2.3 of the Practice Manual operative at the time reads:

> 'If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

[13] No such indulgence was given by the Third Respondent and the Applicant declined to follow the remaining avenues open to it in terms of the Practice Manual. Further, no explanation is tendered as to why the Practice Manual was not followed. In argument Mr Maluleke, who appeared for the Applicant, sought to rely on certain correspondences exchanged between the representatives of the First Respondent and the Applicant after the 60 day period had expired. This amounted to an enquiry from the First Respondent's attorneys as to when the record might be expected. The reply contained no request, even belatedly, for an indulgence.

[14] As stated in *Govender*, in showing that there is good cause in application such as this, an applicant owes the Court an explanation as to why the procedures in the Practice Manual were not followed which includes an explanation as to why an indulgence was not requested and then if same was

not a further explanation as to why the Judge President was not approached. Good cause will be difficult, if not impossible, to demonstrate without tendering some form of explanation for this failure, after all there are safeguards built in the assist an applicant with genuine difficulties in filing the record in time. This has been overlooked in this matter.

[15] There is also no detailed explanation for the period between 22 February 2022 and 24 May 2022. This is required in a condonation application and more so in a reinstatement application where the failure to comply with the Practice Manual must also be explained under the heading of good cause.

[16] This leaves the Applicant reliant on making a strong case out for prospects of success and the importance of the matter.

[17] Under prospects of success only this was stated in the initial founding affidavit to the reinstatement application:

> 'I submit to the Honourable Court that the Applicant's prospects of success are good in the review application. This is evident from the Notice of Motion attached as annexure "S1" above. It is for this reason that the First Respondent is so eager to have the application dismissed on a technicality rather than on merits. I submit to the above Honourable Court that there will be a miscarriage of justice if this Application for Condonation is not granted as issues ventilated in the Notice of Motion referred to above would not have reached the Honourable Court for a final determination.'

[18] The Applicant was granted a judicial lifeline at the previous hearing and permitted to file a supplementary affidavit to deal further with the prospects of success. What emerged is that the Applicant offered the First Respondent a position which would be opening up due the imminent retirement of the incumbent. The First Respondent suggested that an alternate position be offered, which the Applicant viewed as impractical in that it required a new position to be established. These emails were exchanged during 2019, prior

to the granting of the Order by the High Court which reviewed and set aside the appointment of the First Respondent to the position of Senior Manager: Research. No such interaction took place after the High Court Order was granted.

[19] The submissions on prospects of success are frankly lacking. The facts as stated do not set the basis for any reasonable prospect of success. They are, in addition, not the grounds relied on the review application, namely that a crisp legal argument exists to the effect that the First Respondent was not dismissed by the Applicant, but rather subjected to a judicial dismissal.

[20] The true issue is, given the provisions of the High Court Order, whether the employment of the First Respondent was "judicially terminated" or not. All that was ordered is that his appointment to the new position was reviewed and set aside. This must have the result of restoring the *status quo ante* as, but for his appointment into the position of Senior Manager: Research, the First Applicant would have remained a permanent employee of the Applicant. There is no evidence that he tendered a resignation in order to accept the new position.

[21] That leaves the Applicant wholly reliant on the importance of the matter. Here no submissions are made. All that is stated under the heading of "Interest of the Respondents (i.e. prejudice)" is the following:

> 'It is contended that First Respondent will suffer no prejudice resulting from the late service and filing of the Rule 7A(6) Record. As stated above that Rule 7A(6) Record was served on the office of the First Respondent's Legal Representative on the 25 of May already, which is 29 days later than the day when it was due.'

[22] This causes a further problem for the Applicant in that only a portion of the record has been transcribed. Thus there has in fact not been in compliance with Rule 7A(6) and there has been no attempt to reconstruct the record.

[23] In *NUMSA & another v Hillside Aluminium*[5], this Court considered the requirements for condonation being granted as follows:

> 'In determining whether good cause exists, a court is enjoined to have regard to the degree of lateness; the explanation for the lateness; the prospects of success; and the importance of the case - *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-F. The court has a discretion to be exercised judicially upon a consideration of all the facts, and essentially it is a matter of fairness to both sides. Ordinarily the considerations, which are taken into account, are seen as interrelated. No single consideration is individually decisive. Where, as in this case, one is dealing with a lengthy delay, the applicant for condonation is obliged to give a full and extensive account of the delay to assist the court determine whether the explanation for it is reasonable or not. The explanation must be sufficient to enable the court to determine how the delay came about and to allow an assessment of the applicant's motives and conduct for the purpose of making a finding of reasonableness.
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> Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i) (Act 66 of 1995)); that the conciliation process be completed within 30 days (section 191(5) (Act 66 of 1995)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a

[5] [2005] 6 BLLR 601 (LC).

variety of reasons, these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H:

> "There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused."

Similarly, in *Chetty v Law Society of Transvaal* 1985 (2) SA 756 (A) at 765 the then Appellate Division confirmed that good prospects of success alone are not enough in the absence of a reasonable explanation for the default".'[6] (Own emphasis)

[24] In *Steenkamp and Others v Edcon Limited*[7] the Constitutional Court made the following remarks:

'Before turning to the judgments of the two courts *a quo*, it is necessary to briefly consider the legislative context within which the Labour Court exercised its discretion whether or not to grant condonation. Such an application for condonation must be considered taking into account not only the broader objects of the LRA but the nature, purpose and functioning of section 189A(13) of the LRA.

[6] Ibid at paras 11 to 13.
[7] [2019] 11 BLLR 1189 (CC); (2019) 40 ILJ 1731 (CC).

This Court in *Toyota* accepted that the expeditious resolution of disputes in the context of labour disputes is one of the primary objects of the LRA:

> "Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years."[8]

In *Myathaza* four judges of this Court, recognising the adverse effects delays impose on both the employers and employees, pronounced that:

> "[e]mployment disputes by their very nature are urgent matters that require speedy resolution so that the employer's business may continue to operate and the employees may earn a living."[9]

In giving effect to this primary object, the LRA imposes strict time limits within which various applications and referrals must be launched.[10]

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[8] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC) (*Toyota*) at para 1.

[9] *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49; 2018 (1) SA 38 (CC) at para 33.

[10] In terms of section 145(1) of the LRA, a review application must be launched with the Labour Court must be approached within six weeks after the issuing of an award. Similarly, a referral to the Labour Court for a dismissal that is allegedly automatically unfair, based on operation requirements must be made within 90 days after conciliation fails. See section 191(11)(a) read with section 191(5)(b).

Non-adherence to these time limits may be condoned. Both the Labour and the Labour Appeal Courts have incorporated the general principles for condonation referred to above.[11] But they have also infused factors and considerations specific to labour law: Condonation in the case of disputes over individual dismissals will not readily be granted.[12] The explanation for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.[13] Whether the delay was a result of a deliberate, wilful decision not to comply with a lawful and binding award in terms of the LRA is also an important factor to consider.[14] Where the explanation for the delay is the internal processes and procedures of trade unions, the Labour Court has taken a stricter view.[15]"[16]

[25] Given the facts before me the application for reinstatement must fail for these reasons:

1. No explanation is tendered for vast periods of time;

2. No explanation is tendered as to why the provisions of clause 11.2 were not invoked when it was apparent that the record could not be filed in time;

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[11] See *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 10.

[12] Conradie JA in *Queenstown Fuel Distributors CC v Labuschagne and others* [1999] ZALAC 24; (2000) 21 ILJ 166 (LAC) remarked at para 25:

"I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award".

[13] Ibid at para 24.

[14] *Librapac CC v FEDCRAW* and others [1999] ZALAC 6; (1999) 20 ILJ 1510 (LAC) at para 10; *Maseko v CCMA & others* [2003] 11 BLLR 1148 (LC).

[15] *NEHAWU & others v Vanderbijlpark Society for the Aged* (2011) 32 ILJ 1959 (LC); [2011] 7 BLLR 690 (LC).

[16] Ibid at paras 38 to 41

3. The full record has in fact not been filed with the transcript ended midway through the cross-examination of the First Respondent, with no explanation as to why and with no attempt to reconstruct same; and

4. There is basis for the Applicant to suggest that the First Respondent was dismissed in terms of the High Court Order. The Second Respondent's finding that the parties were put into the position which they were prior to the improper appointment of the First Respondent cannot be faulted. The Applicant had remedies available to it such a retrenchment in terms of section 189(3) of the First Respondent could not be absorbed into its structures. Whether it is the First Respondent or the person employed to fill the position is something that have been considered in that position.

[26] The First Respondent pressed for costs. This Court does not apply the principle that costs follow the result and the effect of dismissing the application is that the employment relationship between the Applicant and First Respondent will continue. A costs order would pour oil on already troubled waters. It is accepted that the First Respondent will likely have expended financial resources in this matter, but it would be improper to award costs.

[27] Accordingly, the following Order is made:

Order

1. The application to reinstate the review application under this case number is dismissed;

2. The review application is deemed withdrawn and accordingly the Orders granted in paragraphs 22 and 23 of the Arbitration Award issued by the Second Respondent under the auspices of the Third Respondent on 12 November 2021 under case number GATW 12930-20 are immediately enforceable;

3. The Registrar is directed to archive the review application launched under this case number;

4. There is no order as to costs.

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M Lennox

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. Steven Maluleke

Instructed by: Steven Maluleke Attorneys

For the Respondent: Ms Ram, Lebogang Matlala

Instructed by: A Mawela Incorporated